IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-1521
75-1609
75-1858

THE DOW CHEMICAL COMPANY,
Petitioner

v.

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL.,
Respondents

PETITIONER'S REPLY TO "SUGGESTIONS OF MOOTNESS"

WILLIAM A. JACKSON
Suite 2100
10880 Wilshire Boulevard
Los Angeles, California 90024

ROBERT E. WILLIAMS
LAW OFFICES OF KENNETH C. MCGUINESS
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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INTRODUCTORY STATEMENT

The Dow Chemical Company ("Dow") filed its Petition for a Writ of Certiorari (Docket No. 75-1521) on April 22, 1976. The Solicitor General sought an extension of time until June 3, 1976, in which to study the case and decide whether or not to file a similar petition on behalf of the National Labor Relations Board (the "Board"), disclosing that the Board had requested the Solicitor General to seek review by this Court of the same judgment below on April 21, 1976. The Chief Justice granted

the extension requested by the Solicitor General on April 29, 1976. The Chamber of Commerce of the United States (the "Chamber"), which had also been a party to the proceedings below, filed its own Petition for a Writ of Certiorari (Docket No. 75-1609) on May 4, 1976.

The Union [1] responded to these developments by informally contacting the Solicitor General's office and urging that the Board's request be denied because of the pendency of internal Union proceedings which would assertedly render the case moot by revoking the charter of the Local. The charter revocation proceedings were not actually begun until after the docketing of this case, but were thereafter apparently expedited so as to be completed before the

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[1] The named Respondent throughout these proceedings has been "Local 14055, United Steelworkers of America, AFL-CIO" and Dow will continue to refer to the Respondent as the "Union". It now appears that there will be some argument as to whether the local and international are separate parties, whether one is the *alter ego*, agent, or successor to the other, or whether they were co-conspirators with respect to the acts involved in this case. Dow does not believe it necessary to reach these questions. The same organization has at all material times continuously functioned and conducted a strike against Dow, and Dow considers internal alterations of Union organization immaterial. To minimize ambiguity in discussing the Union's new contentions, Dow will refer in this Reply to the "International" and the "Local", but for the purpose of this discussion it is not necessary to consider whether these are separate entities or merely administrative subdivisions of a single entity.

Solicitor General had decided whether to honor the Board's request.

The Solicitor General advised Dow and the Chamber of the Union's informal representations. Dow and the Chamber informally responded that: (1) the Local continued to carry on a strike against Dow regardless of its standing with the International; and (2) International Union counsel continued to actively prosecute and defend a number of other pending lawsuits on behalf of the Local without raising any suggestions of mootness. In the face of conflicting information as to the ongoing *de facto* existence of the Local, the Solicitor General decided to honor the Board's request and, after a further extension of time, filed a Petition for a Writ of Certiorari (Docket No. 75-1858) on behalf of the Board on June 24, 1976. The Solicitor General did invite the other parties to submit written confirmations of their views on the mootness question and these were appended to the Board's Petition (Board Pet. 1a-24a).

The Union has chosen not to respond to the merits of the three Petitions for Writs of Certiorari. Indeed, the Union has admitted that the question presented is an important one, effectively conceding that it meets the usual criteria for the granting of the Writ. Instead the Union has filed an opposition document entitled "Suggestions of Mootness" (cited hereinafter as "Resp. Sugg.") which presents the affidavit of a Union official as to the purported circumstances surrounding the charter revocation together with legal argument to the effect that the Court should dismiss the Petitions because of mootness.

Mootness suggestions to this Court are usually based on obvious or otherwise uncontroverted changes in factual circumstances. Such is not the case here, Dow denies the Union's assertions and submits that the affidavit proffered by the Union is false and misleading as to numerous matters which Dow can verify and appears to be of doubtful reliability as to other matters.

Since it is not likely that this Court will attempt to make findings as to these controverted matters, Dow does not believe that a lengthy argument as to specific misrepresentations would be productive at this point. It is particularly significant, however, to point out that the Union's new allegations are evasive and equivocal on the specific question of whether the Local continues to function without regard to the status of its International charter.

The primary purpose of this Reply is to discuss the legal theory advanced by the Union as to mootness. If that theory is deficient, further consideration of the truth of the new factual allegations will not be necessary. Certainly the Court should not make a finding of mootness based on contested facts outside of the record. While a remand for further factual determinations would be within the Court's discretion, the preferable procedure would be for the Court to decide the case on its merits, leaving the Union free to raise its new allegations in subsequent compliance proceedings, since they bear not on the propriety of the Board's order but only upon the Union's present ability to comply with it. And even if the case were found moot, this Court should still grant the Writ and reverse the judgment below to

assure that incomplete judicial review will not spawn any undesirable legal consequences.

STATUTE INVOLVED

Additional relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*) are set forth below:

Sec. 2 [29 U.S.C. § 152] When used in this Act—

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists

for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * *

Sec. 301 [29 U.S.C. § 185]

* * * *

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

ARGUMENT

A. The circumstances alleged by the Union would not support a finding of mootness.

The Respondent Union carefully explains that its contention as to mootness is based solely on events transpiring after the conclusion of the proceedings before the Court of Appeals (Resp. Sugg. at 8). It is thus clear that the Union attributes crucial and virtually exclusive significance to the administrative actions taken in May of 1976 by officials of the International for the purpose of revoking the charter of the Local (Resp. Sugg. 10a-12a). The Union then apparently assumes that *ipso facto*, upon revocation of its charter, the Local must necessarily have "ceased to exist" (Resp. Sugg. at 6).

The fallacy in this assumption is the equation of the charter revocation with cessation of existence. The Board has consistently held that since maintenance of an international charter is not essential to the continued existence of a local union as a labor organization, charter revocation is immaterial to its status under the National Labor Relations Act. *Awning Research Institute (Local 1766, Brotherhood of Carpenters and Joiners)*, 116 NLRB 505 (1956); *Kalamath Timber Company (International Woodworkers of America, Local 6-12)*, 35 NLRB 141, 143 (1941).

The Union is well aware that the Board is not satisfied that the Local has actually ceased "ongoing *de facto* existence" (Board Pet. at 14). The Board's Petition disclosed information furnished by the Chamber concerning continued Union legal assistance to Local Union members on matters relative to the

strike against Dow (Board Pet. 6a-20a). The Board likewise disclosed informtion furnished by Dow that the strike itself is still being continued by the remaining membership of the Local. (Board Pet. 21a-24a). Yet the Union carefully avoids any direct discussion of these specific points, pretending not to understand why the Board has "inexplicably" raised the question. (Resp. Sugg. at 9).

Under these circumstances the Court should assume that the Union does not deny that the strike and Union aid to the strikers continue, notwithstanding any internal organizational changes. The Union's evasion of these matters is a fatal inconsistency in its argument that the Local no longer exists. The Board has consistently held that a purportedly defunct union continues to exist for legal purposes so long as any vestige of activity remains, even though on a diminished, informal, or intermittent basis. *San Antonio Light Division, Hearst Consolidated Publications, Inc. (William D. Pearson)*, 130 NLRB 619, 622 (1961); *Montgomery Ward & Co. (United Steelworkers of America)*, 68 NLRB 369, 372 (1946); *Hygrade Food Products Corp. (Butchers Union Local 174)*, 51 NLRB 878, 879 (1943); *Bob-Lo Excursion Company (Seafarers' International Union)*, 44 NLRB 449, 450 (1942); *Universal Match Corporation (United Match Workers' Local 180)*, 23 NLRB 226, 227 (1940).

At the heart of this issue is the peculiar nature of a union as a juridical entity. In terms of common law conceptions, a labor union is merely a voluntary association. Since the law prescribes no formalities for the formation or dissolution of a voluntary association, its existence has historically been too indefi-

nite for the courts to recognize it as a distinct entity capable of suing and being sued as such. Section 301(b) of the Labor Act creates an exception to the usual rule by providing that "labor organizations" subject to the Act shall be regarded as juridical entities by the courts of the United States. The Act does not, however, prescribe any formal requirements for the formation and dissolution of labor organizations, it simply provides a definition of the term "labor organization" in Section 2(5) of the Act, a definition which Congress intentionally "phrased very broadly". S. Rep. No. 573, 74th Cong. 1st Sess. 7.

It is sometimes argued (and apparently assumed by the Union here) that the maintenance of a formal union structure of the traditional sort is essential to the existence of a "labor organization" within the meaning of the Act. "This argument is interesting but it crumbles when put against the broad language used in the statute in defining the term." *NLRB* v. *Kennametal, Inc.*, 182 F. 2d 817, 818 (3rd Cir. 1950). The loss by the Local Union of its bargaining rights is likewise immaterial to its existence. As this Court has previously ruled, the scope of activities encompassed within the Act's definition of a labor organization is far broader than collective bargaining. *N.L.R.B.* v. *Cabot Carbon Co.*, 360 U.S. 203, 210 (1959). Certainly continuation of a concerted refusal to return to work by the remaining membership of the Local Union is more than adequate by itself to establish that the labor organization continues to exist and effectively function. Cf. *Porto Mills, Inc. (Amalgamated Clothing Workers)*, 149 NLRB 1454, 1471 (1964); *Rugcrofters of Puerto Rico, Inc. (Juan Jose Arcelay)*, 107 NLRB 256, 262 (1953); *Perry*

Norvell Company (United Shoe Workers), 80 NLRB 225, 244 (1948). Indeed, almost any element of concerted activity would suffice. See *N.L.R.B.* v. *Smith Victory Corp.*, 190 F.2d 56 (2nd Cir. 1951).

In short, the local Union will continue to exist as long as its members continue to engage in concerted activity on its behalf. It cannot be "cancelled" by the stroke of a pen in Pittsburgh which is ignored by the members still striking in Michigan.

Even if all apparent activity on behalf of the Local Union were suddenly to cease, it would be mere speculation to conclude that its status as a labor organization had terminated. It has been the Board's experience that a labor organization may survive long periods of apparent "dormancy" during which it is virtually invisible but capable of "reactivation" when an opportunity presents itself. See *San Antonio Light Division, supra*, 130 NLRB at 624. "If the court makes no decision as to respondent's former conduct, it may then be repeated; hence a decision as to its legality will not be a futile exercise of jurisdiction". *N.L.R.B.* v. *Clark Bros. Co., Inc.*, 163 F.2d 373, 375 (2nd Cir. 1947). "The Act does not require the Board to play hide-and-seek with those guilty of unfair labor practices". *N.L.R.B.* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 568 (1950).

As a practical matter, the Court need not dwell upon the question of the Local Union's vitality. Insofar as any question of justiciability may be raised, the pertinent concern of the Court is that the case be contested with the necessary adverseness and vigor to sharpen and illuminate the issues for the benefit of the Court. See *Flast* v. *Cohen*, 392 U.S. 83, 106

(1968); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). The Union contends that the purported demise of the Local means that its position may go undefended; however, this contention is presented to the Court in the course of some thirty-four pages of vigorous argument on the Local's behalf, a circumstance which suggests that it should not be taken very seriously. If a party is adequately represented before the Court, its condition in other respects is not of great concern. See, for example, *Robinson* v. *California*, 371 U.S. 905 (1962), where this Court declined to vacate its judgment in a landmark case despite discovering that the appellant had died ten days before the filing of his jurisdictional statement and ten months before judgment had been rendered in his favor.

There is no want of a true adversary contest. There is nothing abstract, feigned or hypothetical about the issues presented. There is a fully developed factual record sharply defining issues arising in a real, historical situation. "None of the concededly imperative policies behind the constitutional rule against entertaining moot controversies would be served by a dismissal in this case." *Sibron* v. *New York*, 392 U.S. 40, 57 (1968). Moreover, the issues raised are of such importance that they must inevitably return to this Court again if not decided now. "Because avoidance of repetitious litigation serves the public interest, that inevitably counsels against mootness determinations, as here, not compelled by the record." *DeFunis* v. *Odegaard*, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting). In contemplating the various policy considerations involved, the Court should feel free to strike a balance which favors re-

view. Note, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672, 1692 (1970).

The Court may also consider the fact that the decision below condoning the Union's conduct has been widely reported. To hinder further review of that decision will necessarily encourage other unions to imitate that conduct. Cf. *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 307 (1964). Dow currently deals with many distributors of other product lines who would be vulnerable to the kind of boycott involved in this case which the Board now appears powerless to remedy as a result of the decision of the Court of Appeals. A reluctance to expose other neutral employees to similar harm is a factor which may affect Dow's position in on-going bargaining relationships with other unions at other locations. Cf. *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 123-4 (1974).

The deterrent value of the Board's decision is a strong argument against a finding of mootness. As this Court has noted, the continuing dispute over the legality of the challenged practices and the public interest in having the legality of the practices settled are factors which militate against a mootness conclusion. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953). This Court has shown a general inclination to reject mootness as a defense to Board orders, noting that the Labor Act is broader in purpose than the regulation of a particular incident or the protection of a particular party. *N.L.R.B.* v. *Raytheon Co.*, 398 U.S. 25, 27 (1970).[2] The Board

[2] Many state courts recognize an exception to the mootness doctrine in cases where the public interest warrants resolution of an important issue. Although this Court has never expressly recognized the public interest exception as a general principle, it has tended to give it tacit application in reviewing N.L.R.B. orders which might technically be characterized as moot; otherwise judicial review of the agency's decisions would be spotty and irregular. Note, *Cases Moot on Appeal: a Limit on the Judicial Power*, 103 U.Pa.L.Rev. 772, 784, 789 (1955).

itself is of the view that to let a single violation go unremedied may encourage an increase in the number and severity of future violations of the Act. *St. Regis Paper Company (Marcella Brendle)*, 192 NLRB 661, 662 (1971). The Board is entitled to enforcement of its orders despite the demise of a particular respondent "in order to protect the public interest in prohibiting and discouraging the commission of unfair labor practices." *N.L.R.B.* v. *Kostilnik*, 405 F. 2d 733, 735 (3rd Cir. 1969). "Vindication of the public policy of the statute" is said to be an independently sufficient ground for granting enforcement in such cases. *N.L.R.B.* v. *Electric Steam Radiator Corporation*, 321 F. 2d 733, 738 (6th Cir. 1963); *see also N.L.R.B.* v. *Colten*, 105 F. 2d 179 (6th Cir. 1939).

Although relying almost exclusively upon the charter revocation, the Union hints at other considerations which might be relevant to the question of mootness. It is true that the Union has not repeated the type of picketing which was challenged in this case since the action of the Board's General Counsel in directing the issuance of a complaint in April 1973, but this restraint has been entirely voluntary. To establish mootness, the Union has the "heavy" burden of proving that there is "no reasonable expectation that the wrong will be repeated." *United*

States v. *W. T. Grant Co.*, *supra*, at 633. The Union has never disclaimed any intention to revive its use of the secondary boycott; even if it did, such a disclaimer would not be sufficient to establish mootness. *Id.* The Union has never claimed that the strike has ended; even if it did, the end of the strike would not make this case moot. *Carpenters Union* v. *N.L.R.B.*, 357 U.S. 93, 97 n.2 (1958). At most, the Union suggests that the International believes that continued efforts in furtherance of the strike would be "futile" (Resp. Sugg. at 4) and that the strike is a "lost cause" (*Id.* at 4a). This amounts to nothing more than a suggestion that the challenged conduct may no longer be perceived as advantageous by the Union, a circumstance which "cannot satisfy the heavy burden of persuasion" which this Court has imposed upon those who interpose the defense of mootness. *United States* v. *Phosphate Export Assn.*, 393 U.S. 199, 203 (1968). Indeed, the evidence of mootness proffered by the Union consists almost entirely of the subjective opinions of Union officials and internal union administrative actions reflecting a loss of interest by such officials in continuing to pursue the objectives of the strike. It has been persuasively suggested that a "finding of mootness in voluntary cessation cases must depend on aspects of the factual situation beyond the defendant's control that make recurrence of the challenged conduct unlikely." Note, *The Mootness Doctrine in the Supreme Court*, 88 Harv. L. Rev. 373, 384 (1974). Under this standard, the proffered matters of internal union administration alleged by the Union are utterly worthless for the purpose of demonstrating mootness.

B. The Court should not make a finding of mootness based on contested allegations as to facts outside of the record, especially where such allegations bear indicia of bad faith.

Where a Board order has become "*obviously*" moot, a court may deny enforcement "without further ado". *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428 (1947). A finding of *obvious* mootness on appeal is possible when based on factual circumstances which are clear from the original record, *N.L.R.B.* v. *Armitage Sand and Gravel*, 495 F. 2d 759 (6th Cir. 1974); or facts which appear in the record after remand, *Reynolds Corporation* v. *N.L.R.B.*, 168 F. 2d 877 (5th Cir. 1948); or facts which are admitted by all parties when raised in oral argument, *N.L.R.B.* v. *McMahon dba McMahon's Sales Co.*, 428 F. 2d 1213 (9th Cir. 1970).[3]

The factual allegations which the Union suggests constitute mootness are neither admitted nor in the record. A finding of mootness, such as the Union urges, would be dispositive of the entire case. Such an important finding should not be made on the strength of a contested affidavit. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970). There has been no opportunity to cross-examine George Watts, the affiant whose credibility the Union would have

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[3] While this is not clear from the reported opinion, Dow is informed by counsel who was present at the argument of *McMahon* that the Board and the Union admitted the truth of the facts bearing on mootness.

this Court simply take on faith.[4] The opportunity to cross-examine is "even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Greene* v. *McElroy*, 360 U.S. 474, 496 (1959). In no other way can the other parties protect their rights and test the sufficiency of the alleged facts to support the finding requested by the Union. *I.C.C.* v. *Louisville & Nashville Railroad Company*, 227 U.S. 88, 93 (1913).

Dow does not admit the facts alleged in the Watts affidavit proffered by the Union, and Dow would expect that the Court would not assume that the affidavit is reliable when it contains testimony which has not been tested by cross-examination and rebuttal. Dow is by no means acting frivolously in questioning the reliability of the Watts affidavit. Much of it is incredible on its face or on the basis of other facts known to Dow, and Dow doubts that it is reliable as to other matters which would require further inquiry with the benefit of compulsory process. A detailed rebuttal to each specific misrepresentation in the Watts affidavit would be of limited value, as this Court is not in a position to judge the credibility

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[4] George Watts is a Union employee who is known to place loyalty to his employer above respect for the courts of the United States; for his open defiance of an order of the United States Court of Appeals for the Sixth Circuit in connection with the very same strike, George Watts was adjudged in contempt. *N.L.R.B.* v. *Local 14055, United Steelworkers*, unreported Civil Contempt Adjudication, May 17, 1973, Case No. 72-2105.

of conflicting allegations as to facts outside the record. It is clear, however, that the affidavit is evasive and equivocal on the question of whether the local Union continues to carry on the strike without an International charter. It is also clear from the timing of the charter revocation that its primary purpose was the frustration of this proceeding. Cf. *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952). Dow must suggest that the Watts affidavit and the position taken by the Union in reliance upon it bear the indicia of bad faith.

A similar situation was presented to this Court in *Southport Petroleum Company* v. *N.L.R.B.*, 315 U.S. 100 (1942). In that case the Board had issued an order requiring Southport to remedy certain unfair labor practices. Southport refused to obey. A compromise was reached which resulted in a stipulation making the order less objectionable to Southport, and Southport agreed that it would render partial compliance. Southport still did not obey any part of the order, forcing the Board to seek judicial enforcement. Southport raised a mootness argument, offering to prove that it had been dissolved and liquidated. While the record was silent as to the motives for the dissolution, the Board pointed to the curious facts that the dissolution was undertaken by Southport just three days after execution of the stipulation of obedience and that it appeared that its business was being continued by another corporation whose connection, if any, with Southport was unclear. The Board urged that the proffered evidence of dissolution be disregarded, not only because it was immaterial, but also because of the appearance of bad faith. See the Record in *Southport* at 32, and the Board's Brief in

Southport at 6. Although the Court avoided making a definite finding as to the credibility of Southport's mootness allegations, their suspicious character did not escape the Court's notice:

> "The petitioner's conduct does, however, give point to omissions of pertinent facts from its allegations. The record makes it certain that it would gain delay by all honorable means and leaves it doubtful whether it has stopped at that." *Southport, supra*, 315 U.S. at 105.

Dow submits that the indicia of bad faith in this case are far more serious than those which were present in *Southport*, and similar treatment by this Court would be in order. To permit the Union to frustrate—or even delay—further action on this case by so transparent a maneuver would be to grant it "a powerful weapon against public law enforcement." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

C. Questions concerning the ability of the Union to comply with the order should be left for resolution at the compliance stage if necessary.

As the foregoing argument has demonstrated, the Court cannot make a finding of mootness based upon contested facts outside of the record. This leaves the Court with two options: (1) it can remand the case for further proceedings on the mootness issue; or (2) it can decide the case on its merits and, if it directs enforcement of the order, leave the union free to raise its purported inability to comply as a defense to any charge of contempt. The choice between these options is discretionary. Dow suggests that the second option better serves the Court's policy of promoting judicial economy and the legislative objective of expeditious enforcement.

It should be emphasized that this is not a case in which it is contended that a change of circumstances would cause the Board's order to have unintended and undesirable consequences; in such cases the Court is likely to consider all of the implications of the order before judgment is rendered. See, for example, *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947). This is a case in which alleged changes in circumstances, the purported dissolution of the Local Union, bear solely upon that party's ability to comply with an appropriate order. In such a case, the Court may characterize the new factual issues as more appropriate for later resolution as matters bearing upon compliance. See *Southport Petroleum Co.* v. *N.L.R.B.*, 315 U.S. 100, 106 (1942).

The *Southport* method for dealing with new factual issues bearing on mootness better serves the interest of judicial economy. While some courts have occasionally remanded cases to the Board for further findings on the possibility of compliance before deciding whether or not to grant enforcement, this procedure has been properly criticized as "cumbersome" and not in accord with the preference of this Court. *N.L.R.B.* v. *Kostilnik*, 405 F. 2d 733, 734 n.3 (3rd Cir. 1969).

Most courts have demonstrated a strong preference for following the *Southport* procedure. See *N.L.R.B.* v. *Colonial Knitting Corp.*, 464 F. 2d 949, 952 (3rd Cir. 1972); *N.L.R.B.* v. *Autotronics, Inc.*, 434 F. 2d 651, 652 (8th Cir. 1970); *Cap Santa Vue, Inc.* v. *N.L.R.B.*, 424 F. 2d 883, 886 (D.C. Cir.

1970); *N.L.R.B.* v. *Kostilnik*, 405 F. 2d 733, 734 (3rd Cir. 1969); *Retail Clerks International Association* v. *N.L.R.B.*, 366 F. 2d 642, 646 n.8 (D.C. Cir. 1966); *N.L.R.B.* v. *Electric Steam Radiator Corp.*, 321 F. 2d 733, 738 (6th Cir. 1963); *N.L.R.B.* v. *Lamar Creamery Company*, 246 F. 2d 8, 10 (5th Cir. 1957); *N.L.R.B.* v. *Haspel*, 228 F. 2d 155, 156 (2nd Cir. 1955); *N.L.R.B.* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209, 217-218 (5th Cir. 1954); *N.L.R.B.* v. *Somerset Classics, Inc.*, 193 F. 2d 613, 615-616 (2nd Cir. 1952); *N.L.R.B.* v. *Acme Mattress Co., Inc.*, 192 F. 2d 524, 528 (7th Cir. 1951); *N.L.R.B.* v. *Dixon*, 184 F. 2d 521, 523 (8th Cir. 1950); *N.L.R.B.* v. *Caroline Mills*, 167 F. 2d 212, 214 (5th Cir. 1948); *N.L.R.B.* v. *National Garment Co.*, 166 F. 2d 233, 238 (8th Cir. 1948); *N.L.R.B.* v. *Vail Mfg. Co.*, 158 F. 2d 664, 667 (7th Cir. 1947); *N.L.R.B.* v. *Weirton Steel Co.*, 135 F. 2d 494, 498-499 (3rd Cir. 1943).

It is clear that the overwhelming weight of judicial opinion is in accord with the general principles set forth by the Third Circuit as follows:

> "We conclude that the fact that a respondent has terminated its business [without a successor and upon death of the proprietor] is irrelevant in a petition by the Board for immediate and full enforcement of an order. Moreover, the courts should not recommit the order for consideration by the Board of the respondent's allegations of impossibility of compliance. *After* the order is enforced by this court, the Board may determine in a subsequent proceeding whether compliance is fully possible. In any event, impossibility may be raised by respondent as a defense if a contempt action is brought against her by the Board." *N.L.R.B.* v. *Kostilnik*, 405 F. 2d 733, 735 (3rd Cir. 1969) (emphasis in original, citations omitted).

It appears that there are only three reported cases in which reviewing courts have chosen the alternative of remanding for findings on mootness before deciding whether to grant enforcement of a Board order, and all involved some question as to the appropriateness of ordering the reinstatement of discharged employees after a respondent employer had gone out of business. *N.L.R.B.* v. *Gilmore Down River Chevrolet, Inc.*, 65 LRRM 3151 (6th Cir. 1967) (not officially reported); *N.L.R.B.* v. *Grace Co.*, 184 F. 2d 126 (8th Cir. 1950); *N.L.R.B.* v. *Reynolds Corp.*, 155 F. 2d 679 (5th Cir. 1946), *remanded*, 74 NLRB 1622 (1947), *enf. den.* 168 F. 2d 877 (5th Cir. 1948).[5]

[5] A remand to consider mootness must be distinguished from a remand to consider substituting a successor. Where it is clear that enforcement can be effective only if sought against a presently identifiable successor who has not been properly substituted or joined in the proceeding, a remand for this purpose may be indicated to assure that the appropriate parties are properly before the court. See *Spomer* v. *Littleton*, 414 U.S. 514 (1974). Such was the case in *N.L.R.B.* v. *Schnell Tool & Die Corp*, 359 F. 2d 39 (6th Cir. 1966), where the Board admitted that a second action for enforcement of the same order against a successor was contemplated and the court, in the interest of judicial economy, remanded so that all parties could be joined in a single proceeding. Even in this situation the remand is discretionary and the court could have granted immediate enforcement in full against the original party despite the future inevitability of successorship questions. See *Cap Santa Vue, Inc.* v. *N.L.R.B.*, 424 F. 2d 883, 886 (D.C. Cir. 1970).

The "questionable value" of electing the option to remand has been properly criticized; "since many mootness determinations turn upon speculation about future probabilities, further factual investigation is likely to be unproductive." Note, *The Mootness Doctrine in the Supreme Court*, 88 Harv. L. Rev. 373, 377 (1974). See, for example, *Reynolds Corp.*, *supra*, 74 NLRB at 1672. Where the substantive question presented by the case cannot be changed by the outcome of a remand, it is unseemly to needlessly shuttle any litigant back and forth from court to court hoping that somehow or other his problem will disappear. *Richardson* v. *Wright*, 405 U.S. 208, 211 (1972) (Douglass, J., dissenting).

While a remand to consider the mootness contentions in the instant case would be within the Court's discretion, Dow would urge the Court to proceed to decide the case on its merits, an approach for which *Southport Petroleum* is ample precedent. Dow is confident that a remand would establish that the Local Union does indeed continue in existence as a clearly functioning labor organization. But even if no evidence of current function could be found, it would then be necessary to consider whether the Local Union is truly dead or only dormant, a highly speculative inquiry at best. There is no cogent reason for delaying enforcement of the Board's order, and it may be safely assumed that if any specific provisions, such as the posting of notices, have become impossible to perform, the Board will not insist upon literal compliance. *N.L.R.B.* v. *Caroline Mills, Inc.*, 167 F. 2d 212 (5th Cir. 1948). If the union is "truly unable" to comply, "this would no doubt be a defense to any contempt action against it." *Retail Clerks*

International Association v. *N.L.R.B.*, 366 F. 2d 642, 646 n.8 (D.C. Cir. 1966) (Burger, C.J.). A remand would inevitably entail considerable additional delay in ultimately securing court enforcement of the Board's order. Congress recognized that contempt of court is the only effective sanction to compel compliance with the Labor Act and Congress intended that judicial enforcement of Board orders would be accomplished expeditiously. "Delay in enforcement procedure due to technicalities would be especially harmful under this act." Conference Report, H. Rep. 1371, 74th Cong., 1st Sess., p. 5. The *Southport* procedure tends to effectuate that Congressional intent.

D. If the case is found moot, then the judgment of the Court of Appeals should be reversed and the decision of the Board permitted to stand as though no review had been sought.

The Union urges that the petitions for certiorari be dismissed because of mootness. The proper disposition of a case which has become moot on appeal is not as simple as the Union assumes. The Court may still "make such disposition of the whole case as justice may require." *Walling* v. *Reuter Co.*, 321 U.S. 671, 677 (1944).

Although Dow contends that this case is not moot, if the Court should make such a finding it would be Dow's contention that the judgment of the Court of Appeals should still be reversed or vacated, if not on the merits, then in accordance with the established practice of this Court in disposing of cases which become moot on appeal. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). This is especially important in the instant case, as the Board's

decision represents an important policy determination in the construction of a statute by the agency charged with its administration. Where complete judicial review is frustrated by mootness in such a case, the judgment of the court below should be eliminated for stare decisis reasons. See Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. Chi. L. Rev. 77, 86 (1955). It is important that the ability of the Board to continue to take the position which it has taken in this case not be prejudiced by permitting the judgment of the Court of Appeals to stand when further review has become impossible without any fault on the Board's part. Cf. *United States* v. *Hamburg-American Co.*, 239 U.S. 466, 477-8 (1916).

The supervisory power of this Court over the judgments of the lower federal courts is a broad one and may be properly utilized "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear, supra*, 340 U.S. at 40-41. In exercising this supervisory power so as to assure a just disposition, the Court has even gone so far as to vacate the judgment of a Court of Appeals and restore an original judgment of a District Court which had been reversed as though no appeal had been taken from the original judgment. *Walling* v. *Reuter Co., supra*, 321 U.S. at 677. Justice would be best served by a similar result in this case. The statutory provision for review of Board orders contemplates more than consideration by the Court of Appeals alone. The judgment of the Court of Appeals, which is not final because the case is pending in the Supreme Court, cannot rightly be made the implement for depriving Dow of the benefit

of the Board's order if the completion of review is frustrated.

CONCLUSION

For the foregoing reasons, The Dow Chemical Company submits that the case is not moot and that its petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM A. JACKSON
10880 Wilshire Boulevard
Suite 2100
Los Angeles, California 90024

ROBERT E. WILLIAMS
LAW OFFICES OF KENNETH C. MCGUINESS
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Attorneys for Petitioner

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